

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

**WSOU INVESTMENTS, LLC d/b/a  
BRAZOS LICENSING AND  
DEVELOPMENT,**

*Plaintiff,*

**v.**

**DELL TECHNOLOGIES INC.,  
DELL INC., EMC CORPORATION,  
AND VMWARE, INC.,**

*Defendants.*

**Civil Action No.: 6:20-cv-00480-ADA-DTG  
Civil Action No.: 6:20-cv-00481-ADA-DTG  
Civil Action No.: 6:20-cv-00486-ADA-DTG**

**JURY TRIAL DEMANDED**

**PUBLIC VERSION**

**PLAINTIFF’S OBJECTIONS TO AND APPEAL FROM MAGISTRATE JUDGE’S  
REPORT AND RECOMMENDATION GRANTING IN PART DEFENDANTS’  
MOTION TO EXCLUDE PREVIOUSLY UNDISCLOSED THEORIES OF STAN  
MCCLELLAN PH.D. CONCERNING INFRINGEMENT OF U.S. PATENT 9,164,800**

Plaintiff respectfully objects to and appeals Magistrate Judge Gilliland’s Report and Recommendation (“R&R”) granting in part Defendants’ Motion to Strike Previously Undisclosed Theories of Stan McClellan Ph.D. Concerning Infringement of U.S. Patent 9,164,800 (the “Motion”), as it contains erroneous findings of fact and contradicts the pertinent law and procedures.<sup>1</sup> *See, e.g., Baylor Health Care Sys. v. Equitable Plan Servs.*, 955 F. Supp. 2d 678, 689 (N.D. Tex. 2013); *see also* Fed. R. Civ. P. 72(a) (“The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.”).

---

<sup>1</sup> Pursuant to the R&R, dated January 30, 2023, (Dkt. 345), the reasoning is stated on the record of the hearing held on January 27, 2023. This transcript is not yet available. Submitted herewith is the Declaration of Jonathan K. Waldrop, dated February 10, 2023 (“Waldrop Declaration”). “Ex.” Refers to exhibits attached to the Waldrop Declaration.

HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY  
PUBLIC VERSION

The R&R is clearly erroneous. Brazos plainly showed—supported by evidence—that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Brazos’s infringement theories focus on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Consequently, Brazos’s

theories were [REDACTED]

*See id.*; *MasterObjects, Inc. v. Meta Platforms, Inc.*, No. 21-05428-WHA, 2022 WL 4856269, at \*3 (N.D. Cal. Oct. 3, 2022) (denying Meta’s motion to strike expert infringement report’s citations to IOS and Android source code not identified in the contentions because those were accused features); *Fenner Invs., Ltd. v. Hewlett-Packard Co.*, No. CIV.A. 6:08-CV-273, 2010 WL 786606, at \*2 (E.D. Tex. Feb. 26, 2010) (denying motion to strike infringement report concerning layer 3 switches even though contentions did not include how the layer 3 switches retain layer 2 MAC addressing as required by the claims); *Mobile Telecomms. Techs., LLC v. Blackberry Corp.*, No. 3:12-CV-1652-M, 2016 WL 2907735, at \*2 (N.D. Tex. May 17, 2016).

Moreover, Defendants’ expert, Benjamin F. Goldberg, Ph.D., responded t [REDACTED]

[REDACTED]

[REDACTED] Defendants knew of [REDACTED]

HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY  
PUBLIC VERSION

████████████████████ See *MasterObjects*, 2022 WL 4856269, at \*3 (noting that striking “will not result in a just trial” because Meta should have known “parts most vulnerable to a theory of infringement.”). For these reasons, Plaintiff respectfully requests that this Court sustain Plaintiff’s objections and vacate Magistrate Judge Gilliland’s Report and Recommendation granting in part Defendants’ Motion to Strike Previously Undisclosed Theories of Stan McClellan Ph.D. Concerning Infringement of U.S. Patent 9,164,800.

Dated: February 10, 2023

RESPECTFULLY SUBMITTED,

By: /s/ Jonathan K. Waldrop  
Jonathan K. Waldrop (CA Bar No. 297903)  
(Admitted in this District)  
jwaldrop@kasowitz.com  
Darcy L. Jones (CA Bar No. 309474)  
(Admitted in this District)  
djones@kasowitz.com  
Marcus A. Barber (CA Bar No. 307361)  
(Admitted in this District)  
mbarber@kasowitz.com  
John W. Downing (CA Bar No. 252850)  
(Admitted in this District)  
jdowning@kasowitz.com  
Heather S. Kim (CA Bar No. 277686)  
(Admitted in this District)  
hkim@kasowitz.com  
ThucMinh Nguyen (CA Bar No. 304382)  
(Admitted in this District)  
tnguyen@kasowitz.com  
Chen Jia (CA Bar No. 281470)  
(Admitted in this District)  
cjia@kasowitz.com  
**KASOWITZ BENSON TORRES LLP**  
333 Twin Dolphin Drive, Suite 200  
Redwood Shores, California 94065  
Telephone: (650) 453-5170  
Facsimile: (650) 453-5171

Paul G. Williams (GA Bar No. 764925)  
(Admitted in this District)  
pwilliams@kasowitz.com  
**KASOWITZ BENSON TORRES LLP**  
1230 Peachtree Street N.E., Suite 2445  
Atlanta, Georgia 30309  
Telephone: (404) 260-6080  
Facsimile: (404) 260-6081

HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY  
PUBLIC VERSION

Hershy Stern (NY Bar No. 4631024)  
(Admitted *pro hac vice*)  
hsfern@kasowitz.com  
Howard L. Bressler (NY Bar No. 2487379)  
(Admitted *pro hac vice*)  
hbressler@kasowitz.com  
Joshua A. Whitehill (NY Bar No. 4766473)  
(Admitted *pro hac vice*)  
jwhitehill@kasowitz.com  
Julianne Laporte (NY Bar No. 5547906)  
(Admitted *pro hac vice*)  
jlaporte@kasowitz.com  
Noah P. Dorman (DC Bar No. 1779821)  
(Admitted *pro hac vice*)  
ndorman@kasowitz.com  
**KASOWITZ BENSON TORRES LLP**  
1633 Broadway  
New York, NY 10019  
Telephone: (212) 506-1700  
Facsimile: (212) 506-1800

Mark D. Siegmund (TX Bar No. 24117055)  
mark@swclaw.com  
Craig D. Cherry (TX Bar No. 24012419)  
craig@swclaw.com  
Justin W. Allen (TX Bar No. 24081977)  
justin@swclaw.com  
Melissa S. Ruiz (TX Bar No. 24128097)  
melissa@swclaw.com  
**STECKLER WAYNE CHERRY & LOVE  
PLLC**  
8416 Old McGregor Road  
Waco, TX 76712  
Telephone: (254) 651-3690  
Facsimile: (254) 651-3689

Gregory Phillip Love (TX Bar No. 24013060)  
greg@swclaw.com  
**STECKLER WAYNE CHERRY & LOVE  
PLLC**  
107 East Main Street  
Henderson, TX 75652  
Telephone: (903) 212-4444  
Facsimile: (903) 392-2267

**Attorneys for Plaintiff**  
**WSOU INVESTMENTS, LLC d/b/a**  
**BRAZOS LICENSING AND**  
**DEVELOPMENT**

HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY  
PUBLIC VERSION

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument was served or delivered electronically via email to all counsel of record, on this 10th day of February, 2023.

/s/ Jonathan K. Waldrop  
Jonathan K. Waldrop